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1961

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Critique: W. Friedmann's "Law in a Changing Society" †

Roscoe Pound*

While a new book, this is an amplification of the author's 1951 book[1] in which he gave promise of becoming a leader among jurists of his time.

More than a generation ago I said: "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change." It is often said that legislatures make laws and that courts find law. But law may be found in enacted laws or in reason applied to authoritative sources. In either event social, political and economic progress call, sometimes gradually but today with increasing urgency and frequency, for change. In legal history changes in social conditions come gradually; radical changes come only at relatively long intervals. But rapid and significant changes in economic conditions due to mechanical invention have made the process of accommodating law to actual social conditions a continuing and pressing juristic and political task.

In 1775, at a time when an Anglo-American common law, as distinguished from a wholly English common law, was being formed, it took General Washington two weeks to go on horseback from Philadelphia to Cambridge, Massachusetts, in order to take command of the Continental Army besieging Boston. In 1961 one can make the same journey by train in four and a half hours or by air in one and a quarter hours. In other words, social and business relations, individual activities, and every-day matters are beyond what was conceivable in the beginnings of our legal polity. In my own life span I have seen gradual change from a time when an ordinary train ran 15 miles an hour and a so-called fast train ran 20 miles an hour to a time when ordinary trains run 60 miles an hour and fast trains run 100 miles an hour. My grandfather knew of travel by horse-drawn canal boat; my father knew of travel by

†London: Stevens & Sons Ltd., 1959. Pp. 503.

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1. FRIEDMANN, LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN (1951).

stage coach. When I was a student it took nearly four days to go from my home in Nebraska to Boston. Today one may make the journey by air in less than four hours.

My life-time has seen the coming of telephones, electric lights, automobiles, airplanes, submarines, and atomic energy. Great industrial enterprises employ thousands of individuals in complicated mechanical operations which involve risk of life and limb; this imposes a burden upon the legal order unknown at the time the law of today was being formed. Moreover, the increasing use of electricity in every-day tasks has multiplied the risks of injury at home. The courts of today are so burdened with litigation over claims of reparation for personal physical injury that there is now agitation to take such claims out of the protection of justice according to law and to commit them to administration.

But relieving the courts of a large share of the task of maintaining justice through a transfer of personal injury claims to less exact and complete (and very likely mechanical) extra-judicial treatment portends the relinquishment of an ideal of justice at a time when we seem to be moving toward a law of the world. Hence, Professor Friedmann's inquiry has immediate timeliness. The purpose and spirit of that inquiry are well stated in the preface: "I claim no more than to have dealt with major social phenomena of our time, as a challenge to which we must seek a solution, and which we cannot ignore by pretending that they are not the lawyer's province, but that of the legislator, the politician, the sociologist, or the economist."[2] He adds: "For better or worse, the creative and moulding power of the law has never been greater than in our highly articulate society. And it has never been more important that lawyers—as legislators, judges, teachers or practitioners—should be more than highly trained craftsmen."[3]

In the first chapter, "The Interactions of Legal and Social Change," the author begins with "the controversy between those who believe that law should essentially follow, not lead, and that it should do so slowly . . . and those who believe that the law should be a determined agent in the creation of new norms . . . ."[4] This "recurrent theme of the history of legal thought . . . is illustrated by the conflicting approaches of Savigny and Bentham."[5] Indeed, the recurrent theme reaches deeper than a polling of the responses of law to changing or changed social conditions. Whether laws are made or found, and whether the legal order is at bot-

2. LAW IN A CHANGING SOCIETY xiii (1959).
3. *Ibid.*
4. *Id.* at 3.
5. *Ibid.*

tom a glorified process of policing by rules items of conduct, or the process of adjudication (which directs courses of conduct according to principles), has been debated since philosophers and jurists began to think about justice and law in antiquity. These are the authoritative starting points for reasoning.

Today the balance has swung to the side of legislative law-making. But the rapid development of the locality's closer contact with the world at large, and the locality's increased dependence upon others for materials and products to maintain industries and activities unknown to the past, have made comparative law a growing point. Thus, jurists are beginning to stress universal principles and law; that is, the emphasis is on the starting points, on legal reasoning rather than local rules.

Especially noteworthy is the author's discussion of the interrelation of law and social change in the Soviet Union. Moreover, his discussion of the relation and interaction of legal and social change is a contribution of the first importance to the science of law. It stands out in the literature of jurisprudence as an independent investigation which is neither shaped in nor directed by the author's preconceptions. The author illustrates how significant changes in social and economic conditions may bring about corresponding changes in law, either by judicial or juristic law finding or by legislative lawmaking. For example, the two world wars have led to the formation of the doctrine of frustration in the law of contracts. This has been achieved by judicial decision in the common-law world and by legislation in the civil-law world.[6] Furthermore, the strong tendency toward uniformity in the law of commercial relations and transactions, notable in law from antiquity, has not been affected by diverse modes of law-finding or law-making. Changed conditions of life create new commercial interests which require valuation and security. Changed conditions also necessitate revaluation and different methods of protecting commercial interests. Of course, new modes of securing interests develop as old ones lose or weaken their efficacy. Thus, the law changes as social and economic life change. This discussion leads to the author's conclusion that "the clear-cut distinction between the law as it is and the law as it ought to be does not exist"; he approves of Judge Learned Hand's proposition that law is "the resultant of many conflicting strains that have come, at least provisionally, to a consensus."[7] Much of the remainder of the book,

6. *Id.* at 27–28.
7. *Id.* at 45, quoting HAND, THE BILL OF RIGHTS 71 (1958).

we are told, "will be concerned with . . . both the possibility and the limits of such consensus in the various fields of law."[8]

Questions of judicial law-finding in criminal law and the interpretation of penal legislation are taken up next by Professor Friedmann and they receive an enlightened treatment. The maxims that penal statutes are to be strictly construed and *nullum crimen sine lege* came from the humanitarian era in the eighteenth century when there was a revolt against inhuman penalties and grossly unfair treatment of the accused. Today these maxims cover too much ground; they include serious offenses against the general security and individual liberty as well as mere breaches of police regulations and regulations which promote the social welfare state. What we seek under the social and economic conditions of today is a balance between legislative purpose and policies and a reasonable regard for individual liberty. In international law, in the progress toward a law (legal order) of the world, the "close interdependence of social cohesion and legal development" seems to assure an ultimate resort to judicial law-finding in the relations of peoples and states.

Summing up his discussion of the theory of legal change, Professor Friedmann considers judicial dilemmas in modern political society. His solution is stated in a prophetic sentence which points the way for an effective science of law: "What the great judges and jurists have taught is not infallible knowledge, or a certain answer to all legal problems, but an awareness of the problems of contemporary society and an acceptance of the burden of decision which no amount of technical legal knowledge can take from us."[9]

In the second part, the author examines the impact which social change has had on our principal legal institutions. He begins with an analysis of property and its key position in modern industrial society. The claim of a capacity to acquire, hold, and exercise control of property as an individual's natural right is fundamental in the political and legal thinking of Locke, of the founders of our Anglo-American polity, of the French Declaration of the Rights of Man, of the interpretation of the United States Constitution, and of the natural law now taught by the Roman Catholic Church.[10] Professor Friedmann also points out that the setting off of the

8. *Id.* at 48.
9. *Id.* at 62.
10. Professor Friedmann has shown in another work that St. Thomas Aquinas and Suarez had not proclaimed this right as a matter of natural law declared by eternal reason, but rather as a matter of social utility and convenience. See FRIEDMANN, LEGAL THEORY 32 (3d ed. 1953).

right of property as such came with the rise of modern commercial and industrial society.

Marxists also consider the institution of private property to be the key to control of the modern industrial society. The capitalist, as owner of the means of production, exercises effective control of society. Hence, ownership of all means of industrial and agricultural production is to be in the organized community. While antiquity placed the foundation of social justice in ethics and Western Europe and America today place it in politics, Soviet thinking places it in economics, expecting the political organization to wither away and government control of the means of production to end.

The thesis of the chapter on property is set forth in the concluding paragraph. While the property rights of the great land owner and the industrial entrepreneur are now restricted, for the average person of limited physical assets the idea that private property is an essential condition of freedom is still accepted, and it has a greater practical effect than it had in the past. Hence, Professor Friedmann concludes that there has been a rebirth rather than a decline of property rights.[11]

In the common law we think of the substratum as well as of the dimensions of property in terms of function. Hence, we are spared artificialities of definition which embarrass the civilian. But the law in Continental Europe is beginning to adopt a more functional approach. As the author says, "there has never been any doubt in the common law that property is not just a full theoretical control over a thing, but a complex of rights, interests, claims, a 'bundle of powers.' "[12] However, the gap between Anglo-American and Continental thinking has narrowed here, as in so many other points today; thus, we may confidently look forward to an eventual law of the world rather than apprehend an eventual disappearance of law. Renner's picture of "capitalist ownership as an octopus whose numerous tentacles—contracts of service, loan, hire or instalment purchase, etc.—enveloped more and more victims"[13] is belied in an era of corporate enterprise by the increasing lack of power of the owner, the individual stockholder, as compared with management control dictated by the technical and administrative complexities of modern large scale enterprises. Mere transfer of ownership of major industrial enterprise does not solve the problem of control in modern industrial society.

Here we are brought to an important distinction. The power

11. LAW IN A CHANGING SOCIETY 89 (1959).
12. *Id.* at 70.
13. *Id.* at 73.

formerly exercised by owners of property has passed to managers of enterprises. But, Professor Friedmann reminds us, the power still derives from property. The power derives from the secured claim to enjoy property in the things available and desirable in the individual life. It is also derived from the ability to affect or interfere with the enjoyment, by others, of these "things." Limitations upon the exercise of rights have attracted the attention of jurists from antiquity. In the laws of today, under the term "abuse" or "abusive exercise" of rights, this subject has become increasingly important. I remember how law teachers debated the spite-fence question when I was a first year student of law in 1889 and how difficult it was for me ten years later to convince a court that it could and should enjoin a farmer, who had acquired a serious dislike of his neighbor, from building a dam across a draw (which ran through his land and his neighbor's below) to intercept surface water coming down the draw in case of heavy rain. Having no use for the intercepted water he dug a ditch from behind his dam to carry the water off to a creek. Thus, the farmer cut off the use of surface water which his neighbor impounded below and used to water stock. As the author says, the practical interest of the doctrine is smaller than its theoretical interest. No doubt there is a logical contradiction in terms in the phrase abuse of rights or abusive exercise of rights. Hence, it has been said that the right ceases when the abuse begins. However, the question is not one of logical definition but rather one of social purpose. Professor Friedmann states the matter well: "American legal opinion has moved far from the days when the sacrosanctity of private property was the core of its thinking."[14]

Within a generation we have gone far in imposing salutary restrictions on the ownership and use of property. Redistribution of ownership and control of financial credit are now regarded as the legitimate ends of legislation whereas they would have been abhorrent to the generation in which I was brought up. But, as Professor Friedmann points out, these changes have resulted from the growth of corporate power.[15] What must stand first in the society of today is the protection provided for the use of the individual's labor and skill, and security in his opportunity to use them. Doing away with private property is not the path to security for these interests.

Next, the author examines the striking contrast between the law of contracts as I studied it 70 years ago, and to some extent taught

14. *Id.* at 80.

15. Corporate power, the law, and the state are discussed in chapter 9 as part of Professor Friedmann's examination of society and the individual. *Id.* at 288.

it 60 years ago, and the actual function of contracts in the society of today. In the formative era there were four elements in each contract: freedom of movement, insurance against calculated economic risks, freedom of will, and equality between parties. They were "closely linked, and to some extent, overlapping, but each had a distinct meaning."[16] The first two were essentially formal in character; the other two "expressed political and social ideologies."[17]

In a developing industrial society, the contract was an institution which enabled men and goods to move freely; this aspect was seen by Sir Henry Maine in his theory of the development from status to contract. Thus, the author compares the static rural and patriarchal society of the South before our Civil War with the industrialized and commercialized North. The latter required unrestricted mobility of labor and held economic bargaining value to be the standard which regulated the demand for labor. When I began to teach law in 1904, Maine's doctrine was applicable to every aspect of life. Those who came to it after the metaphysical-ethical expositions of Blackstone in which our teachers had been brought up, had accepted it as ultimate truth. It is a real service to the science of law, therefore, to remind us that development of the social service state, group organization and collective bargaining in industry and commerce, and industrial mobilization have been reversing the movement Maine taught, at least to the extent of a new kind of immobility.

Freedom of will, applied to the creation and the terms of a contract, does not raise questions which need special consideration. But formal equality all along the line was regarded by the older utilitarianism and democratic theory as being promotive of social liberty and equality. However, as Dicey pointed out in 1905, the actual development of capitalist society was increasingly out of accord with this theory of which the law of contracts was an expression. Accordingly, the author devotes the greater part of his argument to "the growing gap between the early philosophy of contract and the reality of contemporary society."[18] It is affected by his feeling, natural in one schooled in Continental juristic theory, of "the organic weakness of judicial law reforms."[19]

As the author states, no developed system of law has ever maintained or even attempted an absolute freedom of contract; on the other hand, no legal system has been wholly indifferent to a mani-

16. *Id.* at 90.
17. *Ibid.*
18. *Id.* at 95.
19. *Ibid.*

fest inequality between the parties. Equity granted relief to infants, trust beneficiaries and others under legal disabilities. Nevertheless, the general interposition of equity has not gone substantially beyond the adjustment of rights of property. Thus, the author demonstrates that American courts, with all the opportunities that our common law system seems to offer, "cannot effect major social adjustments by using contract as a social equaliser."[20]

The remainder of the chapter on contracts is devoted to what the author terms "the transformation of contract"; that is, "a transformation in the function and substance of contract, which is creating a widening gap between legal reality and the traditional textbook approach."[21] He finds four principal causes for this transformation: a general concentration of industry and business which has resulted in the standard contract, or, as the French put it, the "contract of adhesion"; second, an increased substitution of collective for individual bargaining in industry; third, an expansion of the social service functions of the state in the common-law world which has led to statutory contract terms; and, fourth, as a result of wars, revolutions, and inflation, a development of legal excuse for non-performance—for example, the doctrine of frustration. This study of the general legal effect of contract standardization must profoundly affect much that has been taken as established in the science of law as understood in the English-speaking world.

The author examines the compulsory terms of a contract as required by the public interest (especially as a device to enforce social policies), public authorities as parties to a contract, collective bargaining, and contract as the realization of economic expectations. The mere list of these headings shows Professor Friedmann's vast departure from what the jurist and law writer of the past regarded as the field of the law. In summary, the author shows that contract is being moved into public law. It is becoming increasingly institutionalized as an expression of social and economic policies. As a result, there has come to be an exercise of public law functions by what are in name private law groups. Collective bargaining has gone far toward giving the employee an assured status. Finally, the law of contract now expresses social economic policies, and the ethical individual conception is no longer in the foreground. As the author puts it, the "contract becomes the foundation for a broad adjustment of risks in which private agreement and public policy are mingled."[22]

20. *Id.* at 99.
21. *Id.* at 101.
22. *Id.* at 125.

My teachers would have paused at the title of the next chapter—"Tort and Insurance." Can it be, they would have asked, that a man can be insured against the consequences of his own wrongdoing? The very word "tort" speaks of a wrong done for which the doer must answer. Indeed, when I began the study of law in 1889, the teaching of the law of torts was what would be regarded today as wholly inadequate. We studied assault and battery, false imprisonment, malicious prosecution, slander and libel, trespass to land, and conversion of chattels. There were a few lectures on negligence but the subject was not really studied. In truth, there was little negligence, as it is known today, in a prairie community in those days. Such things as automobiles, electric power lines, or exploding bottles were unheard of. Furthermore, the extent of liability has been radically altered. Originally, liability existed only for intentional attacks upon the person or for the intentional taking or injury of another's property. Then liability was extended to cover the subjection of a person or property to unreasonable risk of injury, if an injury occurred; this extension resulted in the consideration of intentional and negligent injuries together in the broad category of fault. Liability is now being supplemented, if, indeed, it has not already been supplemented, with the imposition of liability upon industry for undertakings which involve risks (and injury) to employees or to those who acquire or handle the product. We still keep the term tort. But it has ceased to point necessarily to any element of wrongdoing. As the author says, while western society has not completely abandoned the ideal of individual responsibility for social conduct, a growing emphasis is placed on the community's responsibility for accidents that befall the individual. This, he adds, is not an abandonment of individual responsibility in the older situation which called for reparation; however, it is an "objectivation" of fault liability when we deal with corporate rather than individual persons.

Here we are brought to a serious question raised by the shift of liability from the one who acts to the one better fitted to "absorb" the risk. This shift began in the formative era of law with the master's liability for an injury caused by his servant; the master's liability was derived by analogy from the head of a household's liability for an injury caused by a dependent member whom he was bound to defend. In modern law this vicarious liability was justified by attributing it to the power of control which the master had, and the employer in modern society was likened to the master. As the author puts it, the enterprise presents certain risks to the community for which it must carry the responsibility.

Today, any shift of the burden of repairing injuries is affected by the general practice of private insurance against automobile accidents, whether voluntary or compulsory. Recently air transportation has been adding to the awesome annual total of injury due to factories and automobiles. As I said some years ago, "Tempest, fires, flood, pestilence and famine, which men used to fear, as our prayer books bear witness, take no such toll today." Accident injuries "have made even war take a second place." How to cope with this situation has become perhaps the most pressing problem of the law reformer of today. Accordingly, the author looks into the progression from individual responsibility imposed by tort liability to the idea of social insurance, particularly as developed in the United States through workmen's compensation laws. He shows that two lines of development have taken place: first, tort liability has been extended; and second, the legal burden has been shifted from the active agent in the injury to a third person. Thus, by an analysis of the relation between these two developments, the author considers the future of the law of torts.

The author analyzes the duties of manufacturers, builders and repairers to those who acquire and use their products. These duties are based on a theory of contract liability unless the injury occurred in the course of use. In the latter situation liability is based on an idea or duty of care. The manufacturer's contract liability to the distributor does not exclude his tort liability to the user. This has been extended by the doctrine of *res ipsa loquitur*. In addition, the principle of nonliability of a principal for the torts of an independent contractor has been subjected to so many exceptions that the principle is now one of liability rather than of nonliability. Hence, liability is imposed on the person in control of the enterprise. Also, in American law, the immunity of hospitals from liability for the negligence of its employees is now rejected by most of the stronger courts. Although the law has not grown up consistently, the principle is now being accepted that the occupier of property is liable in tort for any possible damage that he might have foreseen. Finally liability under the doctrine of *Rylands v. Fletcher*[23] is being extended. One consequence of putting liability on a broader basis is that it is increasingly hard, in practice, for a defendant to escape liability if he has imposed a risk on others. Correspondingly, it is easier for one who has suffered injury to obtain redress.

A related subject, in which significant change has taken place within a generation, is the employer's duty to his employees—or,

23. L.R. 3 H.L. 330 (1868).

what my generation called the relation of master and servant. This is not merely a matter of legislation. As a proposition of common law, an employer has, within the past generation, become bound to provide competent supervisors, proper and safe appliances with which to work, adequate systems of operation, and due supervision. Any failure to provide these essentials is considered negligence. Moreover, the courts at the same time are finding negligence where the courts of the past could not see it. *Volenti non fit injuria,* the fellow servant rule, and even contributory negligence have either disappeared or are disappearing as defenses available to the employer.

Professor Friedmann considers that in comparison with England, which after the second World War experienced reaction in the direction of judicial conservatism, the American courts have continued the extension of tort liability. However, objective standards of conduct rather than individual items of behavior continue to be the test of what we still think of as fault liability. Nevertheless, there has been a far reaching shift of responsibility for injuries and the burden of reparation is imposed on the enterprise instead of on the victim. Moreover, I feel we must agree with him that a problem of spreading risk from the person immediately concerned to a larger group seems to be increasingly pressing. Accordingly, he looks to the agencies of private or social insurance to take over considerable areas of what we have been calling tort liability. No doubt, as he tells us, the adjustment of insurance and tort liability, when the two are applied to the same incident, must steer between the Scylla of double compensation to the victim and the Charybdis of immunity for the tort-feasor.[24] Neither the amount of carelessness nor the accident rate are noticeably affected by the degree of civil liability fixed by law. In addition, the idea of a moral element in legal civil liability for negligence is only a leftover from legal history.

I shall not attempt a review of the different plans for the adjustment of insurance and tort liability. That task has been undertaken by Professor Fleming James. Instead, it will be enough to indicate four propositions which Professor Friedmann uses to conclude the chapter. They are: (1) In the socially most significant parts of the law of torts—traffic and industrial accidents and manufacturer and employer responsibility—the fault principle has either been superseded or lost its moral significance and, therefore, tort law is barely distinguishable from strict liability. However, he be-

24. Compare *id.* at 348. I assume that the ethical connotation of "tort-feasor," which gets its flavor from history, has little real significance.

lieves that this movement has been arrested by the spread of social and private insurance. (2) The principle of "minimum compensation for the vicissitudes of modern life," met by comprehensive social insurance, or partial schemes of social insurance such as workmen's compensation or automobile-accident insurance legislation, or compulsory private insurance with compulsory third party liability has been widely accepted.[25] (3) The dilemma of double compensation for the victim or indemnity to the tort-feasor has been reduced because many cases of apparent double compensation are really cases of collateral benefits, and the moral significance of fault liability has become very restricted. (4) The "admonitory function of tort liability" could be restored by restricting tort liability to gross or criminal negligence; thus, the relationship of fault liability in tort would exist as it does in criminal law.

Professor Friedmann also recalls Holmes' forecast, as far back as 1881, that the state might at some time thereafter take over the whole field of compensation for injury and replace the law of torts. Here is food for thought for the common-law lawyer who characteristically thinks of and looks to adjudication rather than to administration.

Chapter 6 examines criminal law, a subject which the common-law writers on jurisprudence have given relatively little attention. Austin left only 25 pages of fragmentary notes on criminal law in his *Lectures on Jurisprudence*. Holland, in his later editions, devoted a scant half dozen pages to the subject. I must confess myself guilty of a like neglect of a field of the legal order deserving of better and fuller treatment.[26] There is a fashion in such things. From Roman times institutional writers have devoted themselves to the civil side. Professor Friedmann, however, has maintained a better proportion. The subjects he has taken up are modern psychiatry and the responsibility of the individual, social environment and the modification of penal sanctions, the changing scope and function of criminal law, economic crimes against the community, the corporation and criminal liability, strict criminal responsibility and public welfare offenses, and para-criminal sanctions. We are rightly told that the state of the criminal law is a "decisive reflection of the social consciousness of a society"[27] and so it is particularly sensitive to changes in social structure and social thinking. He goes fully into the mooted question of the M'Naghten rule. Thus, he

25. LAW IN A CHANGING SOCIETY 163–64 (1959).

26. Although I have had occasion to teach the subject in two law schools, I find but three references to it in the index to my five volume work. See POUND, JURISPRUDENCE (vols. 1–5 1959).

27. LAW IN A CHANGING SOCIETY 165 (1959).

points out that the legal order is based on the assumption that man is a rational being so that the "norms of order in any given society can be based on the hypothesis that the great majority of men and women are capable of controlling their conduct."[28] He adds that "to deny the assumption means no less than the denial of the possibility of a legal order."[29]

In the present century a profound change has taken place in the treatment of juvenile offenders. Beginning 50 years ago, the juvenile courts, with procedures and sanctions very different from those of the ordinary courts, superseded the latter's jurisdiction over offenders under an age usually fixed at 18. Indeed, there is now a tendency to take away the juvenile court's power to apply sanctions and, instead to commit the juvenile to an administrative child welfare agency or a youth authority. California, for example, has gone so far as to set up an adult authority on the model of the youth authority, hence, the courts' jurisdiction and authority to maintain the general security is again transferred to an administrative agency. The assimilation of judicial procedure by administrative procedure has obvious dangers, as has been brought out much of late, and the maintenance of a balance between rule and discretion becomes a larger problem each day. But, as Professor Friedmann notes, "We should direct our attention to the working out of the safeguards against the abuse of welfare activities rather than against their substance. This applies to the field of criminology no less than that of administrative discretion in general."[30]

Finally, the chapter examines in detail the protection of public economic interests, the growth of corporations as active economic agencies, and the welfare functions of the state of today. Antitrust legislation recognizes, as part of the criminal law's protection of the nation's basic economic order, the need to maintain a competitive economy based on private enterprise. These laws, which are designed to insure free commercial and industrial activity, have become a source of embarrassment to the criminal law. In addition, they have often made it impossible for business enterprises to obtain assured advice as to the legality of a projected undertaking; hence, free enterprise has been restrained rather than aided by the effort to promote it. Thus, something analogous to strict liability in the law of torts has developed in criminal law and it is justified as a method of balancing social interests. As the author says, the "purpose is to compel business to apply stricter standards of inquiry and control to transactions which may endanger

28. *Id.* at 176.
29. *Id.* at 176–77.
30. *Id.* at 185.

public security."[31] But he feels we have here an administrative rather than a penal problem.

This analysis of criminal law is concluded by an examination of an individual's vital interest—his right to work—which can be injured beyond the protection of judicial trial. The author notes that there is a danger of a legal no-man's land arising "where an individual can be effectively injured or even destroyed, without the protection of the criminal process or the legal safeguards of administrative justice."[32]

In chapter 7 the author considers the basic concepts and principles of the Western family with respect to the relationships between husband and wife, parent and child, and family and State. Until the arrival of the industrial age, the family in the Western world was the basic economic and social unit; this was felt to have a religious foundation. The family was dominated by the father as head of the household while the married woman "was confined to the control of the domestic sphere." However, profound changes continue to occur. Among these changes are new expressions of social philosophy, improvements in the economic status of the family, and the rise of the social service state. The author then considers the indissolubility of the marriage tie and the "breakdown principle." This principle is applied when the marriage is disrupted beyond redemption, and its maintenance only "serves to undermine and poison the relations between the various members of the family."[33] Under the heading "Changing Foundations for the Cohesion of the Family," the author considers preventive care and public policy, and, in particular, the domestic relations and children's courts. He arrives at the eminently sound and well founded conclusion that "divorce and separation proceedings are not just another form of litigation, but one aspect of a precious and complex social institution, the family, and that they have to be dealt with as a social and therapeutic problem rather than in terms of the success or failure of a legal action."[34] One might add that in the United States the domestic relations court involves only one aspect of the court organization problem which has not received the attention it requires.

The author proceeds to an ethical, sociological, psychological, criminalogical and juristic consideration of the goal of marriage and the legitimacy of abortion. While I have little capacity to assess this analysis, it is clearly carried on with assured competence

31. *Id.* at 200.
32. *Id.* at 204.
33. *Id.* at 210.
34. *Id.* at 228.

and thoroughness. Finally, Professor Friedmann considers the equality of husband and wife in the marriage community, matrimonial property law, parents and children, the illegitimate child, and the State and the family. The author's treatment is comprehensive; he has canvassed the legal materials and assessed the value of both present and projected laws. This is an exceptional contribution to comparative law. I would call attention particularly to what is said about the community idea in the management of family affairs. It is illustrated by "the introduction of the joint income and property concept into Federal Tax declarations by husband and wife in the United States,"[35] the "replacement of the more or less absolute powers of the father, based on property rights, by broader moral and legal responsibility towards his children;"[36] by "the translation of the social and legal emancipation of the married woman into a corresponding equality of rights and duties towards the children;"[37] and by "the increasing responsibilities of the State and other public authorities for the welfare of children."[38] Also a duty of support has been emerging as legal duty toward a legitimate minor child—this is also being extended to the wife. Moreover, there is a worthwhile review of the status of the illegitimate child.

In the summary we are told that the social security plans of today seek to strengthen the family although much of the traditional private law of the family may be modified. "Here, as in other fields," we are reminded, "only a combination of public and private responsibilities can create conditions that are in accordance with contemporary social needs."[39]

The third part of the book, "Society and the Individual," examines (1) the freedom of economic movement, (2) the relation of group power and the modern state, and (3) the limits within which administrative supervision of private organizations can operate without jeopardizing the organization's necessary freedom.

First, the author considers some "basic antinomies." For example, there are the difficulties and contradictions inherent in Bentham's idea of free trade. Bentham proposed that there should be an equal opportunity to trade freely. Thus, Bentham expected, "the pursuit of each trader of his economic advantage would work out to the common good." Experience, however, has shown that while an industrial society needs competition, unrestrained compe-

35. *Id.* at 243.
36. *Id.* at 246.
37. *Ibid.*
38. *Ibid.*
39. *Id.* at 260.

tition may lead to destruction of all competition. A critical survey of English judicial and American legislative treatment of freedom of trade and restrictive practices brings out the inability of courts, trained in traditional legal techniques and principles, to deal with deep economic and social problems by a course of decision from case to case. A comparison of English decisions on restrictive trade practices, which are based on common-law principles and of American decisions interpreting the fourteenth amendment, is very suggestive.

Philosophy of law has always thought its chief problem was the reconciliation of an individual's freedom with the freedom of others. But, as the author points out, the real problem of the legal order is to determine how to reconcile this fundamental dilemma in practice under changing economic conditions. How we endeavor to deal with the latter problem is the point of this part of the book; how we may, on the basis of reasoned experience, solve the problem is the end purpose of the whole book.

In order to show that the traditional juristic treatment of the problem has failed to meet the exigencies of an increasingly complex and changing economic order, the author discusses "the escapist approach" of British courts, of British anti-trust legislation, and of American anti-trust legislation, and he concludes that we should "come more and more to regard specialised courts or other quasi-judicial agencies, which are not exclusively staffed with lawyers, not as 'extraordinary' courts, but as a new form of tribunal demanded by the social conditions of our time."[40]

A similar suggestion with respect to the legal treatment of other problems is being urged by others. For example, the National Probation and Parole Association (now the National Council on Crime and Delinquency) called for the creation of "family courts" in 1959. One must concur with Professor Friedmann as to the need for the tribunals he proposes. However, if his proposal is adopted, it must be recognized that the unnecessary multiplication of independent specialized judicial or administrative agencies is always a danger. Each tribunal will be complete in itself and, hence, there will be potential conflicts of jurisdiction with like tribunals or agencies. Today there is also a need for a better organized judicial system to provide a unified court with a competently chosen and responsibly directed staff. The reshaping of our institutions of public justice to meet the requirements of today is inevitable. Perhaps, a Ministry of Justice as proposed by Bentham in 1823 and by Cardozo in 1921 is the ultimate solution.

40. *Id.* at 286.

In chapter 9, "Corporate Power, the Law and the State," the author relates group power in the modern state to the freedom of the individual. We are rightly told that the legal problems involved in this relation have, until recently, escaped juristic discussion commensurate with their importance. Accordingly, he considers the accidents of legal form which, especially in Anglo-American law, have left group power outside of legal control. He calls them the "legal cloaks of corporate power." They are the ability and power of great organizations which are engaged in commercial operations to escape the liabilities of corporate personality, the exceptional possibilities of a trust cognizable only in equity, the limitations of equitable remedies which prevent judicial handling of abuses of power except where property interests of members or beneficiaries are involved, and the liberal interpretation given to the term "charitable" in connection with charitable trusts.

As Maitland said in 1936, the trust cognizable only in equity gave us a liberal supplement for a meager law of corporations applicable to charities and other non-commercial institutions. But today these unincorporated associations have acquired many attributes of legal personality. Hence, the reluctance of charities to incorporate has decreased, and the legislatures have subjected these unincorporated associations and associated activities to "corporate liabilities." Nevertheless, traditional theory assumes that an association is private rather than public, and, hence, it should be classed with the individual man in evaluating its relation to the public. Therefore, we must readjust our traditional juristic thinking to the economic and social developments of today. Accordingly, the chapter proceeds to take up social and legal impacts of the American foundation, corporate power and the state, and the international aspects of corporate power. This discussion contains a competent and critical comprehension of comparative law, of current Anglo-American legislation, and of adjudication; furthermore, the author's understanding of the relevant economic and sociological materials is beyond anything our common-law jurists have attempted.

What has just been said also applies to chapter 10—"Individual Freedom, Group Control, and State Security." The only suggestion I could make to this well informed, well organized, and enlightened discussion is to refer to the possible utilization of the common-law doctrine of duties and liabilities which are imposed on either public service performances or those engaged in public employment.

In conclusion the author calls attention to the "increasing inter-

penetration of public and private law elements."[41] The totalitarian state can adjust itself to the problem thus presented by turning private law into public law. This is not possible in the mixed economic systems of today's industrial democracies. What is called for is "a more than formal safeguarding of 'due process' in the personal, political and social life of the individual."[42] The author advocates that a distinction be made between the affairs of private associations which affect the basic freedoms (opinions, movement, business, work) and those which do not (social clubs). As to the former, due process protection is developing through the reviewability of unfair practices and the assurance of procedural safeguards. However, continuous administrative supervision of private institutions will "jeopardize that minimum of freedom of association without which democracies can slide to the brink of totalitarianism."[43]

Part IV, "Public Law," devotes two chapters to the legal aspects of public administration. In chapter 11, "The Growth of Administration and the Evolution of Public Law," the author notes that the "growth of the administrative process has been a universal phenomenon of contemporary society . . . ."[44] As society became more complex it became necessary to add to the already existing functions of defense, administration of justice and police regulation. These were taught to my generation in the eighties and nineties of the last century as the whole business of government. A continually increasing list of specialized social services has grown up everywhere. It extends from the assumption of managerial as well as regulatory control of economic activities in a socialized country, to the mixed economies of Western Europe in which managerial and regulatory administrative functions are combined, to the now highly developed administrative law in the United States where little attention is paid to the managerial aspect of the administrative process and the emphasis is placed on regulatory functions. Between a regime of unregulated economic enterprise and one of public ownership, systems which are rejected by American public opinion, we rely upon public regulation. However, in our highly industrialized society regulation is complicated by our polity of 50 state governments with general local governmental powers and a superimposed Federal Government of specified powers. This requires "a vast and complicated mechanism of administration." Understanding administration to mean "public supervi-

41. *Id.* at 343.
42. *Id.* at 344.
43. *Ibid.*
44. *Id.* at 347.

sion and control of private and official activities," the result is that the United States "is the administrative State *par excellence*."[45] It has not been easy for one brought up in the common-law tradition taught to my generation to realize this. But, as the Reverend Mr. Jasper puts it, "the sun do move."

Next the author takes up the need for a system of public law. In an absolutist state there is no place for a distinction between public and private law. As Professor Friedmann states: "Ultimately, all law dissolves into administrative discretion."[46] But, as he points out, three jurists who rank among the foremost rejected this dichotomy. In order of time, they are Albert Venn Dicey, Leon Duguit, and Hans Kelsen. Neither Duguit nor Kelsen have influenced American thinking on this subject, although Kelsen does consider that administrative law makes public authority arbitrarily superior to the private citizen.

On the other hand, Dicey vigorously opposed the recognition of administrative law in the common-law world and his influence long hindered its proper development. Professor Friedmann shows, what I suppose the common-law lawyer of today has grudgingly come to concede, that the government "cannot in all respects be equal to the governed, because it has to govern."[47] That is, "inequalities between government and citizens are inherent in the very nature of political society."[48] To those who carried Dicey's views to the extreme, administrative law was not law at all. Thus, even as late as 1959 I felt that I had to argue that administrative law could properly be called by its name of law. One of the obstacles to recognition of a distinction between public and private law was the doctrine of separation of powers. The argument was made that there was no place for administration in the three-fold distribution of governmental power. This argument is disposed of by the author in a section entitled "Separation of Powers and Administrative Law." There the argument is correctly dismissed as "a fallacy of conceptualism."

Next, the author examines the limits of administrative discretion. Discretion is a subject which has fared badly in common-law thinking and writing. Lord Camden commented that the discretion of a judge "is the law of tyrants." Lord Penzance agreed; he noted that it is the exercise of judicial discretion which "shakes public confidence in the justice of the tribunal." Now that separate courts of equity and equity procedure are being abandoned, we must

45. *Id.* at 349.
46. *Ibid.*
47. *Id.* at 351.
48. *Id.* at 352.

revise much that has been thought and said about discretion. What Professor Friedmann has to say about administrative discretion parallels what I recently said about the need for "rethinking on the meaning of such basic values as liberty and property in the legal and social context of contemporary society." The key proposition is that "there is always an element of choice, and therefore of creative law-making, in each individual decision that applies general criteria."[49] What the author insists upon is "a clear distinction between the planning or policy level—where discretion must be unhampered, unless the statute imposes a clear public or private duty to act—and the operational level—where the duties of care and the standards to be demanded of public authority must, in the public interest, be equal to those demanded of private citizens."[50]

Chapter 12, "Government Liability, Administrative Discretion and the Individual," is an admirable exposition and discussion of a subject in which new ideas are needed to meet the complexities of world commercial and industrial relations. It begins by noting how the *Rechtsstaat* (law state) idea, and the recognition of a separate system of administrative law and jurisdiction, developed a principle of government legal responsibility "at a time when the common law jurisdictions were still firmly caught in the web of feudal government immunities."[51] Thus, government and public authorities could be held liable on a legal basis and, yet, distinct principles of governmental responsibility could be worked out according to principles of administrative law. French administrative law, for example, developed the administrative contract. Since common law theory only knew one type of contract, American courts held public authorities either liable on the contract under the usual rules or not liable at all. But the result is not juristically satisfactory and the recognition of government contract as an institution of administrative law seems inevitable.

In the next section, "Governmental Liability and Tort," there is an analysis of Dicey's proposition that the government servant's personal liability for wrongs done in exercise of his public functions—while the Crown is immune—was based on the principle of equality before the law. But, as Professor Friedmann notes, "the whole doctrine of the common law has long ceased to have much vitality,"[52] and this rule is merely "an unsatisfactory mixture of lingering feudal concepts, public law concepts and civil law con-

49. *Id.* at 362.
50. *Id.* at 369.
51. *Id.* at 371.
52. *Id.* at 384.

cepts."[53] In the United States, the Federal Tort Claims Act of 1946, legislation in 13 states, and judicial decisions have (1) recognized the principle of governmental liability subject to certain exceptions, (2) established governmental tort immunity, or (3) attempted to distinguish between the governmental and nongovernmental functions of municipal corporations. Mr. Justice Frankfurter has aptly styled this confusion a "quagmire."[54] It is apparent therefore, that the dichotomy of public law and private law must be maintained.

Succeeding sections treat statute law, privileges of government, function and status of the public corporation, and definition and general characteristics of the public corporation. The author particularly criticizes the Federal Tort Claims Act as reactionary because it subjects a government corporation to the uncertainties of government liability: "The tendency to turn all government corporations into agents of the Government reflects Congressional jealousy rather than any clear thinking on the nature of public enterprise."[55]

The final chapter of Part IV is devoted to Anglo-American administrative remedies and procedures. In Continental Europe a person aggrieved by an administrative act or procedure has a simple and comprehensive remedy. The challenged act or order can be annulled, or the claimant can be compensated. In the common-law world, administrative proceedings are generally reviewed only through the use of "extraordinary legal remedies."[56] These are technical remedies limited by settled rules, and there is no simple all-embracing proceeding. Much needless trouble is caused in common-law jurisdictions by a distinction as to judicial, quasi-judicial, and non-judicial proceedings and tribunals. Technical requirements and rules determine what is judicial, quasi-judicial, or administrative; they also decide what constitutes a "denial of justice" or "error on the face of the record." Recently, the declaratory appeal and the declaratory judgment have been developed as means of review. Nevertheless, there needs to be an overhaul and simplification of administrative law procedures as has been done in civil and in criminal procedure since 1912. Furthermore, the conduct and review of administrative action must be systematized and unified as has been done for judicial action in the United

53. *Id.* at 381.
54. Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).
55. LAW IN A CHANGING SOCIETY 401 (1959).
56. These are the old prerogative writs of mandamus, certiorari, and prohibition, or in equity the injunction, or today the declaratory judgment, or in case of detention of the person, the writ of habeas corpus.

States since 1912. In fact, it appears that administrative justice as a whole needs organization and modernization. As Professor Friedmann emphasizes: "The basic problem—the recognition of the duality of the legal system as an inevitable corollary to the development of modern government—is one which the common law world can continue to ignore or belittle only at the cost of failing to develop a healthy balance between the needs of administration in the modern welfare State and the essential rights of the citizen."[57]

Part V, "Law Between Nations," first considers social organization and international law. After an extensive examination, Professor Friedmann states nine conclusions: (1) Government corporations formed for the purpose of carrying out commercial or other economic activities should clearly be presumed to be outside the sphere of State immunities. (2) International trade agreements will increase and will be effective among States of comparable organization. (3) Effective customary rules as to trade between neutrals and belligerents no longer exist and the only remedy lies in *ad hoc* agreements. (4) The traditional distinction between State acts and private acts are broken down because of State transactions. (5) Any State must be presumed to have the means to control activities that are intimately connected with the conduct of foreign relations. (6) State responsibility for international delinquencies extends to the activities of all those groups and individuals who, by the structure and organization of the State, must be presumed to act by authority of the government. (7) Where general measures are applied equally to nationals and foreigners alike, it is doubtful how far a principle of international law justifying a claim for compensation is still recognized.[58] (8) International law still demands strict adherence to the principle of due process developed in jurisprudence—both nontotalitarian and totalitarian countries profess agreement on minimum standards of procedural justice. (9) Where states must cooperate, such cooperation will be confined to states which agree on economic and social organization and principles. Thus, it can be seen that two world wars and the increasing complexity of social, and economic and industrial organization have had a profound effect on the international law

57. *Id.* at 413.

58. But compensation for losses incurred, not for expectation of future profits, should be allowed in cases of specific commitments by treaty or contract, appropriation of the benefits of foreign enterprise (unjust enrichment), or action contrary to reasonable expectation created by the action of the State (estoppel). *Id.* at 467.

expounded by Wheaton[59] and W. E. Hall[60] on which I was raised. St. Thomas Aquinas called upon us to look at law under the aspect of eternity. However, if international law is looked at in a universal aspect, it seems to be bewilderingly complex and particular.

Part IV concludes with a chapter on national sovereignty and world order in the nuclear age which examines the political, economic and juristic aspects of international law trends and of international order. This examination consists of three sections: (1) the present position of national sovereignty; (2) regional groupings and universal international law; and (3) the development of international law on three levels—in these two areas and as a universal law which expands "slowly in those fields where common interests and necessity are not deeply affected by divergent interests and standards."[61] The author then considers the interrelation of these three levels, the legal integration of like-minded States, and, the integration of standards in the transfer of national powers to a supernational authority (in the European Coal and Steel Community). He notes the hope that the growing threat to the security and, indeed, the survival of mankind may drive us to a world order. But mankind will probably need some remaking to assure that result, and another destructive world war may result in our being set back to a primitive civilization. Short of such a catastrophe, an instinct of self preservation may induce the contending *blocs,* we are told, "to remain at arm's length and to develop for this purpose such legal relations and contacts as are required for the maintenance of a live and let live co-existence."[62] To this end, he reminds us, it is important that a universal organization such as the United Nations be kept in active operation for the purpose of "universal levels of coexistence and even limited co-operation."[63] And on the level of cooperative international law, he adds, "the world will have to progress through less than universal regional or functional groupings of more closely knit states—often developing in mutual antagonism—hoping for the day when common faith or necessity may bring about a truly universal world order."[64]

Part VI concludes the book with a chapter entitled "The Rule of Law, The Individual and the Welfare State." Kantorowicz has

59. ELEMENTS OF INTERNATIONAL LAW (Boyd's ed. 1878).
60. INTERNATIONAL LAW (1st ed. 1880).
61. LAW IN A CHANGING SOCIETY 475 (1959).
62. *Id.* at 479–80.
63. *Id.* at 480.
64. *Id.* at 481.

aptly said that *Rechtswissenschaft ist Wortwissenschaft.* Unfortunately, juristic discussions often take the form of controversies over the meaning of words. Two phrases which are the subject of the final chapter recall Kantorowicz's gibe. They are Dicey's well known phrase, "the rule of law" and the term "welfare state." The rule of law stood for the regime of adjusting relations and ordering conduct in society by law. This is in contrast to leaving them unordered subject to chance conflict and/or individual wilfulness or to the arbitrary ordering of them by official commands. This easily suggests to student beginners the idea of a law as a legislative command and law as a body of such laws. By the rule of law Dicey did not mean *ordre juridique* or *Rechtsordnung;* nor did he want to suggest *jus* rather than *lex* to the untrained Anglo-American ear. The term welfare state has also lost its real significance to the general reader or hearer because we have learned from the beginning that even the most arbitrary tyranny has always claimed to serve the welfare of its subjects. Thus, the adherents of Bentham and Austin assume that those who use Dicey's phrase are preaching their doctrine, and the jurists of the Soviet regime assume that theirs is the modern state.

The author takes us over the common ground of jurisprudence, social ethics, politics, and economics in their vicissitudes in this era of far reaching social change. We are reminded that to give to "the 'rule of law' concept a universally acceptable ideological content is as difficult as to achieve the same for 'natural law.' "[65] Hence, Professor Friedmann only seeks to formulate a definition acceptable to modern democratic ideas; he bases it on three foundations—equality, liberty, and the ultimate control of government by the people. The first is understood to mean that inequalities shall be inequalities of function and service but shall not be derived from "race, religion, or other personal attributes." Liberty is interpreted to mean that in so far as an individual is granted specific rights they are to be free from arbitrary interference. And the principle of control by the people is understood to mean that law must ultimately be the responsibility of the elected representatives of the people.

The complexity of modern life has caused a vast expansion of governmental functions. The traditional function of the state was that of protector. Classical liberal thought believed this was the state's only legitimate function. But protection, as one function, has been divided into many social service functions, and these are a second category which require the development of administrative

65. *Id.* at 490.

law. In addition the State now carries on industrial and commercial activities—a third category—and public enterprise often operates alongside private enterprise. This creates the need for an economic controller to allocate "scarce resources among different industries and for different purposes." However, this creates a serious problem in a planned democratic economy; it holds that individual freedom is essential and, yet, it must reconcile the demands of both private and public enterprise. Finally, it is pointed out that the state functions as arbitrator between different groups in society. Today this raises serious problems in labor law. We are told that the state as arbitrator in a democratic society has three tasks: "maintenance of a rough balance between contending organized groups and the usually unorganized consumer; the protection of the individual freedom of association; and the safeguarding of overriding State interests."[66]

In his conclusion, the author observes that:

> "it would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be a craftsman. His technical knowledge will supply the tools but it is his sense of responsibility for the society in which he lives that must inspire him to be jurist as well as lawyer."[67]

This book does for the law of the predawn of the twenty-first century what Dicey's *Law and Public Opinion in England in the Nineteenth Century*[68] did for Anglo-American law of the twentieth century. We thought, when I entered teaching as my life work in 1907, that he had taught us the path of the law. But it was the path of the past. Now, I feel assured, we have been clearly shown the path of the century to come. However, Professor Friedmann would be the last to flatter himself that we shall now see *la diritta via* for all time to come.

66. *Id.* at 502.
67. *Id.* at 503.
68. (1st ed. 1905).